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On 23 June 2016 the UK voted to leave the EU in a referendum called by the government. Article 50 of the Treaty on the European Union states that any member state may leave “in accordance with its own constitutional requirements”. The vote itself did not trigger article 50. There then arose the question as to whether the decision to give Brussels formal notice that Britain was withdrawing, under article 50, was one for the government, using the royal prerogative, or for Parliament through statute.

On 24 January 2017 the UK Supreme Court confirmed the UK government could not trigger the formal process of leaving without an Act of Parliament. The judgment upheld a High Court ruling handed down in November in which claimant Gina Miller, alongside a number of other claimant groups, won their challenge to Government plans to trigger article 50 using the royal prerogative without consulting Parliament.

This was a landmark constitutional case, raising both legal and commercial issues. As such, you could expect to be asked about it in interview. Consider how to use the ‘chunking down’ technique explained in Chapter 12 to answer the following question in a way that shows not only your understanding of the legal implications, but also your commercial awareness by your ability to place it in a wider context.

**1. What has interested you, from a legal and non-legal perspective, in the legal process resulting from the UK referendum on Brexit?**

Constitutional law

1. The case raised key constitutional issues. Would you know to identify that the UK has an unwritten constitution? Can you compare and contrast this to other constitutions? What are the comparative advantages and disadvantages?
2. Are you able to show understanding of the independence of the judiciary, rule of law and the separation of powers?

Independence of the judiciary

3. The UK prides itself on the independence of its judiciary. Can you explain clearly your understanding of what independence of the judiciary means?
4. There were allegations that the judges were straying into politics and policy<sup>1</sup>. Do you think the judges maintained their independence in this case, and how would you support your argument? What was the ruling? That there should be no Brexit? That Brexit should be delayed? Or did it say that Brexit must be done constitutionally not unconstitutionally?
5. Are all judges necessarily independent? How are our judges selected? This has been a topical issue lately in the US too; can you discuss that, and the intention of President Trump to appoint judges specifically on the basis that they share some of his own views and values?<sup>2</sup>

The reaction, the role of the media and freedom of speech

6. There were some vicious attacks on judges and the claimants in the media, including a Daily Mail headline labelling the high court judges ‘enemies of the people’<sup>3</sup>. Can you discuss freedom of the press and the right to free speech?

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<sup>1</sup> Watts J, ‘Brexit: Government’s most senior lawyer issues stark warning against Supreme Court judges’ (2016) <<http://www.independent.co.uk/news/uk/politics/brexit-latest-news-supreme-court-ruling-theresa-may-article-50-eu-referendum-mps-a7456031.html>> accessed 26 January 2017

<sup>2</sup> ‘Trump Tells ‘60 Minutes’: ‘I’m Pro-Life. The Judges Will Be Pro-Life’ (CNSNews.com, 2016) <<http://www.cnsnews.com/news/article/melanie-hunter/trump-says-hell-appoint-pro-life-judges-if-roe-v-wade-overturned-it>> accessed 30 January 2017

<sup>3</sup> Falconer C, ‘The vicious assault on UK judges by the Brexit press is a threat to democracy’ (*The Guardian*, 2016) <<https://www.theguardian.com/commentisfree/2016/nov/04/assault-uk-judges-brexit-press-judiciary-constitution>> accessed 26 January 2017

- Again, can you think of any recent examples where this topic has arisen elsewhere, perhaps in the US election?
7. The government, and in particular the Lord Chancellor, were criticised for being slow to defend our judges<sup>4</sup>. Could you identify Liz Truss as the Lord Chancellor? Can you discuss the obligation to defend judges? Do they benefit from freedom of speech to defend themselves? Should they?
  8. Do you think those feeling free to express themselves in the media were well informed about constitutional law and the relevant legal issues? Do you think they understood the issues raised in question 4 above? Is there an obligation on those who express a view publically to have properly informed themselves of the facts? Should there be?
  9. What are your feelings about the public reaction to the referendum vote? There was much criticism from both sides, with some of those who voted Remain labelling those who voted Leave as 'stupid' and those who voted Leave criticising Remain voters as the 'liberal elite'<sup>5</sup>. Has the art of debate between those with different opinions been lost (a rant by fictional political satirist Jonathan Pie on this matter went viral on YouTube<sup>6</sup>)? Recent research was published about the role of social media and how it can shelter a user from differing opinions and reinforce a sense that the user's opinion is 'right'<sup>7</sup>. Do you agree?
  10. What do you think about the alleged paradox between one of the goals of the Leave campaign being to restore the supremacy of our own Parliament to assert our constitutional rights, and the reaction of some in the Leave campaign when it did just that<sup>8</sup>? What does it say about the importance of everyone understanding the basics of our constitution? Should law be part of the school curriculum? What would you include in the syllabus?
  11. In light of the questions above, did the case impact on how you feel about the knowledge, understanding and skills you have learned during your legal education? Does it bring you advantages in everyday life? How do you react when someone expresses that they do not share your opinion? Do lawyers learn to approach this differently? What qualities must a good lawyer have in their approach to conflict? Do your friends without a legal education approach conflict differently to you, and if so how? How, if at all, would you have preferred people to react to those who voted differently from themselves?

### The Rule of Law and separation of powers

5. Can you explain clearly the Rule of Law; the understanding that no-one is above the law, and it will be applied fairly and consistently to all? How was it a relevant issue in this case? You might consider how this is also relevant in other current affairs; how did lawyers and judges react to President Trump's executive order in January 2017 for an immediate suspension of immigration from seven countries?<sup>9</sup>

<sup>4</sup> Elgot J, 'Liz Truss confronted by Tory MPs over handling of article 50 row' (*The Guardian*, 2016) <<https://www.theguardian.com/politics/2016/nov/08/liz-truss-confronted-by-tory-mps-handling-of-article-50-row>> accessed 26 January 2016

<sup>5</sup> Hilton S, 'Ex-Cameron adviser: Anti-Brexit ruling reveals staggering arrogance of liberal elites' (2016) <<http://www.foxnews.com/opinion/2016/11/04/ex-cameron-adviser-anti-brexit-ruling-reveals-staggering-arrogance-liberal-elites.html>> accessed 26 January 2017

<sup>6</sup> 'Jonathan Pie Blames The Left For Trump, Tories And Brexit' (*Huffington Post*, 2016) <[http://www.huffingtonpost.co.uk/entry/jonathon-pie\\_uk\\_5825cb47e4b09ac74c52316b](http://www.huffingtonpost.co.uk/entry/jonathon-pie_uk_5825cb47e4b09ac74c52316b)>

<sup>7</sup> Herbert W, 'Is twitter an echo chamber' (2016) <[http://www.huffingtonpost.com/wray-herbert/is-twitter-an-echo-chamber\\_b\\_7636668.html](http://www.huffingtonpost.com/wray-herbert/is-twitter-an-echo-chamber_b_7636668.html)> accessed 26 January 2017

<sup>8</sup> Grice A, 'It's ironic and outrageous that the Brexiteers who talked about 'power for the people' don't want Parliament to have a say' (2016) <<http://www.independent.co.uk/voices/brexit-brexiteers-article-50-ironic-parliament-power-for-people-theresa-may-vote-outrageous-a7357951.html>> accessed 27 January 2017

<sup>9</sup> Shear MD, Kulish N and Feuer A, 'Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide' (2017) <<https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>> accessed 29 January 2017

6. Can you explain how the claimants were able to bring a case against the government? And what were the grounds for the government's appeal to the Supreme Court?
7. Are you able to discuss the government's claim that prerogative powers could be invoked to allow Brexit without recourse to Parliament? And that the ruling confirmed the sovereignty of Parliament over the executive powers exercised by the Prime Minister on behalf of the Crown? Do you agree with the ruling, and can you explain why? What was the view of the three judges who dissented?<sup>10</sup>

### The referendum

8. Are you aware of the Referendum Act 2016, and can you show understanding of the nature of a referendum and that, in the absence of clear wording to the contrary, it is advisory only?
9. Do you think the voters as a whole had this understanding before they cast their vote? Did the government explain accurately the effect of the referendum to the electorate when they said "This is your decision. The Government will implement what you decide"? Do you think the government had a sufficiently clear understanding of the advisory nature of the referendum at that time, and had thought through the political and legal issues that might result from a Leave vote? Whose responsibility is it, do you think, to ensure a voter understands clearly the effect of their vote before they cast it?
10. How would you describe the turnout of voters? Was there an apparent apathy or enthusiasm of any particular group of voters towards voting? Did you vote and can you explain why? Do you think the referendum result might influence people to think differently in future about their vote and whether or how to exercise it?
11. Do you know how many people voted Remain and how many voted Leave?<sup>11</sup>

### The Supreme Court

12. Can you name the claimants in this case, and the lawyers who represented them?
13. One of the claimants, The People's Challenge, used crowdfunding to raise the funds to bring their case to court. Do you understand and can you explain the concept of crowdfunding as a relatively new way of raising finance? Can you discuss your views on the costs of bringing a case to court? Do you think justice is available to all? Are you aware, for example, of the current situation regarding legal aid, the availability of pro bono legal advice, acting as a litigant in person and the direct access scheme for barristers?
14. Some criticised the claimants as establishment forces doing all they could to slow down or otherwise frustrate the will of the people<sup>5</sup>. Do you agree or disagree with this view, and why?
15. Can you name all eleven Supreme Court judges, and identify the three judges who dissented? Are you aware that this was the first time an appeal case was heard by all eleven judges; a constitutional first?
16. Can you explain the effect of the judgment, that an Act of Parliament must be passed to give Brussels notice of the decision of the UK to withdraw from the EU (that is, to trigger article 50). Can you explain the basis of the decision, that Parliament must be involved in the reversal of the European Communities Act 1972 which gives domestic effect to the UK's obligations under EU law? That withdrawal makes a fundamental change to the UK's constitutional arrangements by cutting off the source of EU law and removing some rights of UK residents?

<sup>10</sup> 'R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references: Press Summary' (*Supreme Court*, 2017)

<<https://www.supremecourt.uk/cases/docs/uksc-2016-0196-press-summary.pdf>>

<sup>11</sup> 'EU Referendum results' (*The Electoral Commission*, 2016)

<<http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 26 January 2017

### What next?

17. Can you name David Davis as the Secretary of State for Exiting the EU? Are you aware of how Parliament is made up? Can you anticipate how the Bill will progress? Is its success guaranteed?<sup>12</sup> Why might the government have wanted to avoid the involvement of Parliament to trigger Article 50?<sup>13</sup>
18. Despite initial demands from the President of the European Commission, Jean-Claude Juncker, that we effect a swift exit, do you understand that the decision to trigger Article 50 actually lies with our Parliament and, once it has done so, the EU Treaties can continue to apply to Britain for two years?<sup>14</sup> Did he understand that and if so why might he have wanted to press for a swift exit in any event? What do you think is the purpose of the two year delay?<sup>15</sup> Can it be argued that the lawyers had better prepared for Brexit than had the politicians?
19. How do you predict the other EU member states might react to Brexit?<sup>16</sup>

Consider the 'chunking down' technique used above (Constitutional law —Independence of the judiciary—The reaction, the role of the media and freedom of speech—The Rule of Law and separation of powers—The Referendum—The Supreme Court—What next?). You can use this structure to reveal the commercial awareness issues in any similar scenario. Examples above demonstrate, for example, how you could use it to comment on the events during the beginning of the presidency of President Trump.

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<sup>12</sup> Mason R, 'MPs will not block May's deal for UK to leave EU, says David Davis' (*The Guardian*, 2017) <<https://www.theguardian.com/politics/2017/jan/18/mps-will-not-block-mays-deal-for-uk-to-leave-eu-says-david-davis>> accessed 30 January 2017

<sup>13</sup> 'Article 50 ruling: What does it mean for Brexit – and what happens next?' (2017) <<http://www.telegraph.co.uk/news/0/article-50-ruling-does-mean-brexit-happens-next/>> accessed 18 January 2017

<sup>14</sup> 'Brexit: UK resists swift withdrawal pressure' (*BBC News*, 2016) <<http://www.bbc.co.uk/news/world-europe-36633810>>

<sup>15</sup> Lilico A, 'Yes, we can legally sign a US trade deal before Brexit – no matter what the EU thinks of it' (*The Telegraph*, 2017) <<http://www.telegraph.co.uk/news/2017/01/23/yes-can-legally-sign-us-trade-deal-brexit-no-matter-eu-thinks/>> accessed 30 January 2017

<sup>16</sup> Foster P and others, 'Brexit contagion: UK vote raises fears of a tsunami of EU membership referendums' (2016) <<http://www.telegraph.co.uk/news/2016/06/28/brexit-contagion-uk-vote-raises-fears-of-a-tsunami-of-eu-members/>> accessed 26 January 2017